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# In the Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1390

**ALTON BOX BOARD COMPANY, et al., and RICHARD ELDH,**
*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**
*Respondent.*

**In Re Folding Carton Antitrust Litigation**

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Alton Box Board Company, *et al.*,* and Richard Eldh, respectfully pray that a writ of certiorari

* This Petition for a Writ of Certiorari is joined in and submitted on behalf of the following corporate Petitioners: American Can Company, Brown Company, Burd & Fletcher Company, F. N. Burt Company, Inc., Champion International Corporation, Consolidated Packaging Corporation, Container Corporation of America, Diamond International Corporation, Eastex Packaging, Inc., Federal Paper Board Company, Inc., Fibreboard Corporation, The A. L. Garber Company, Inc., Hoerner Waldorf Corporation, International Paper Company, Interstate Folding Box Company, The Mead Corporation, Packaging Corporation of America, Potlatch Corporation, Rexham Corporation, St. Regis Paper Company, and Weyerhaeuser Company.

issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 1, 1977.

## OPINIONS BELOW

The opinion of the Court of Appeals, rendered by unpublished order, appears in Appendix A hereto at pages A1-A4, and the Order denying the Petition for Rehearing with Suggestion that the Rehearing be En Banc appears in Appendix A hereto at pages A5-A6. The opinion of the District Court as set forth in Pretrial Order 18, which was affirmed by the Court of Appeals, appears in Appendix B hereto at pages B1-B5.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 1, 1977. A timely Petition for Rehearing with Suggestion that the Rehearing be En Banc was denied on February 22, 1978, and this Petition for Writ of Certiorari was filed within 90 days of that date pursuant to 28 U.S.C. §2101(c). An order staying the Court of Appeals' mandate was entered on March 1, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether grand jury transcripts should be disclosed for purposes of general discovery in a civil antitrust action where no disclosure has been made to any of the corporate employers of the witnesses who appeared before the grand jury, and where there has been no demonstration of "particularized need" or "compelling necessity" by the civil antitrust plaintiffs?



## RULES AND STATUTE INVOLVED

**Federal Rule of Criminal Procedure 6(e):**

(1) *General rule.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) *Exceptions.*—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) *Sealed Indictments.*—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

**Federal Rule of Criminal Procedure 7(f):**

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

**Federal Rule of Criminal Procedure 16(a)(1)(A):**

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest



in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

**Federal Rule of Criminal Procedure 32(c)(3)(A):**

Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

**18 U.C.S. §3500(a), (e)(3):**

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness

(other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

• • •

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

• • •

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

## STATEMENT OF THE CASE

Corporate Petitioners are all but three of the corporate defendants in eighty-one currently pending civil treble damage antitrust cases which have been consolidated in the United States District Court for the Northern District of Illinois, Eastern Division, by the Judicial Panel for Multi-District Litigation under the title *In Re Folding Carton Antitrust Litigation,* Master File No. MDL 250. These civil suits follow on the heels of a now concluded criminal antitrust action encaptioned *United States of America* v. *Alton Box Board Co., et al.,* No. 76 CR 199, in the United States District Court for the Northern District of Illinois, Eastern Division, in which these same Petitioners were all the corporate defendants* in addition to fifty

* Gulf States Paper Corporation, Georgia-Pacific Corporation and Olinkraft were not defendants in the criminal action, but were added as defendants to the civil antitrust action. Consequently, they are not Petitioners here. One defendant in the criminal action, Michigan Carton Company, has since merged into St. Regis Paper Company and is not a separate Petitioner here.



individual defendants, all of whom were at one time employees of the corporate defendants. All the defendants in the criminal action pleaded *nolo contendere,* except for defendants Consolidated Packaging Corporation and defendants Vern Kepford and Melvin Riecke who went to trial.

None of the fifty individual defendants testified before the grand jury which returned the indictment in 76 CR 199, but in the course of its proceedings the grand jury heard testimony from numerous witnesses, many of whom were present or former employees of the defendant corporations. Petitioner Richard Eldh, of defendant American Can Company, was one of those witnesses. The grand jury transcripts of the testimony of some of those witnesses, including that of Richard Eldh, were made available to the attorneys for defendants Consolidated Packaging Corporation, Vern Kepford and Melvin Riecke pursuant to the Jencks Act (18 U.S.C. §3500(a), (e)(3)), *Brady* v. *Maryland,* 373 U.S. 83, 10 L.Ed.2d 215 (1963), and Rule 7(f) of the Federal Rules of Criminal Procedure.* In addition, one attorney for several individual defendants examined two short excerpts of testimony from two grand jury witnesses which were furnished to the attorney as exculpatory material

* Consolidated Packaging Corporation, Vern Kepford and Melvin Riecke examined either the entire transcripts or portions of transcripts of fourteen witnesses in the course of preparation for trial, none of whom were employees of Consolidated Packaging. Those witnesses whose transcripts were examined were: Robert Stuberg, James E. Williams, John P. Watt, Richard Eldh, Al DeFazio, James R. Meadows, Jr., Alvin J. Robertson, Eugene Blankenheim, Charles Emmert, Michael Lambert, Howard Bell, Thomas Jewell, Roman V. Hencel, and Jonathan Shaffer.

pursuant to *Brady* v. *Maryland*.* However, no transcripts of the testimony of any grand jury witness were disclosed to the present corporate employer of that witness,** and no one from American Can Company ever saw the grand jury testimony of Petitioner Eldh. In fact, with the exception of Consolidated Packaging Corporation and Weyerhauser, the remaining twenty Petitioners did not see the grand jury testimony of any grand jury witness.

Prior to sentencing in the criminal action, the government prepared seventy separate "statements in aggravation," one for each of the forty-eight individual and twenty-two corporate defendants who pleaded *nolo contendere*. These "statements in aggravation" summarized for each defendant the government's position with respect to the facts, and contained either summaries or excerpts of various witnesses who appeared before the grand jury. Pursuant to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure, two of the twenty-two statements relating to the corporate defendants, and thirty-three of the forty-

* Mr. John Christie, attorney for individual defendants Fred L. Bohlke, E. J. Curtiss and George Wohlgemuth, examined parts of the grand jury testimony of witnesses James R. Meadows, Jr., and Frederick Empkie.

** Pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A), Mr. Duane M. Kelly, attorney for defendant Weyerhauser, examined the transcript of the testimony of grand jury witness Roman V. Hencel, a retired Weyerhauser employee, and small portions of the testimony of witnesses Alvin J. Robertson and Michael Lambert, both of whom had in the past been Weyerhauser employees. Mr. Kelly also inspected portions of the testimony of grand jury witnesses James R. Meadows, Jr., John P. Watt, and Eugene Blankenheim, none of whom were Weyerhauser employees.



eight statements relating to the individual defendants, were examined by counsel representing the particular defendant to whom the statement pertained. The statements disclosed to the two corporate defendants did not refer to any grand jury testimony of their own employees,* and no grand jury testimony of Richard Eldh as it appeared in any "statement in aggravation" was disclosed to American Can Company.

After commencement of the civil treble damage cases referred to above, the Plaintiffs filed with the District Court on or about November 22, 1976 a motion seeking an order upon the United States Department of Justice, Antitrust Division, Midwest Office, to produce for inspection and copying, *inter alia,* "all transcripts of grand jury testimony which were heretofore made available for examination and/or inspection and/or copying to any defendant in [the prior criminal action]," and "all presentencing reports and/or memoranda filed in said action and made available to any defendant therein. . . ." The Plaintiffs sought these grand jury transcripts only to facilitate general discovery in connection with their civil antitrust actions.

On June 30, 1977, the District Court below entered Pretrial Order 18 which, *inter alia,* ordered that the Government make available for inspection and copying the grand jury testimony and the "statements in aggravation" containing grand jury testimony sought by the Plaintiffs, wherever it was determined that such grand jury testi-

* The statement in aggravation relating to Champion International Corporation contained a citation to one page of the grand jury testimony of Alvin J. Robertson, and the statement in aggravation relating to Alton Box Board Company, which was read to its attorneys, did not quote any grand jury testimony or name any grand jury witness.

mony had been disclosed for whatever reason to any defendant or defendant's counsel in the criminal action (Appendix B at B2). Under Pretrial Order 18, no "particularized need" or "compelling necessity" for the transcripts was required to be shown by the Plaintiffs as required by *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 2 L.Ed.2d 1077 (1958). and the transcripts were discoverable upon the sole showing that they had been disclosed for whatever reason to any defendant or defense counsel in the prior criminal action.

The District Court reached its decision despite the fact that the record before it unequivocally demonstrated that no corporate defendant in the criminal action, Petitioners here, saw the grand jury testimony of any of its employees (although one corporate Petitioner did see the grand jury transcripts of its former employees). Under Pretrial Order 18, the transcripts of grand jury testimony of witnesses that were disclosed to the criminal defendants or their counsel pursuant to *Brady* v. *Maryland,* 373 U.S. 83, 10 L.Ed.2d 215 (1963), or the Jencks Act, 18 U.S.C. §3500(a), (e)(3), or Federal Rules of Criminal Procedure 7(f), 16(a)(1)(A), or 32(c)(3)(A), but which were never disclosed to any of the corporate employers of those witnesses, became available to the Plaintiffs in the civil antitrust action simply for discovery purposes.

On July 8, 1977, the corporate defendants in the civil antitrust actions, Petitioners here, filed their Notice of Appeal from Pretrial Order 18, and on July 14, 1977, Petitioner Richard Eldh filed his Notice of Appeal from Pretrial Order No. 18 as it related to the disclosure of his grand jury testimony. The appeals were assigned numbers 77-1697 and 77-1798, respectively, by the United States Court of Appeals for the Seventh Circuit, and consolidated before that Court.



On December 1, 1977, in an unpublished order reflecting its decision rendered from the bench at the close of oral argument on November 11, 1977, the Seventh Circuit affirmed Pretrial Order 18 (Appendix A at A1-A4). In so affirming, the Court of Appeals held:

1. That Pretrial Order No. 18 was a final and appealable Order;

2. That the corporate defendants, Petitioners here, have standing to oppose the disclosure of grand jury testimony; and

3. That the grand jury materials sought by the Plaintiffs may be disclosed for use in the civil antitrust cases because "the ultimate question on these appeals is whether the District Judge abused his discretion in weighing the usefulness to the plaintiffs of the material released against any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances. Appellants have not persuaded us that this discretion was abused."

On February 22, 1978, the Seventh Circuit denied Petitioners' Petition for Rehearing with Suggestion that the Rehearing be En Banc. On March 1, 1978, the Court of Appeals stayed the issuance of its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure pending the timely filing of this Petition for a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AS TO WHETHER GRAND JURY TRANSCRIPTS SHOULD BE DISCLOSED FOR PURPOSES OF GENERAL DISCOVERY IN CIVIL PROCEEDINGS.

In *Texas* v. *United States Steel Corporation,* 546 F.2d 626 (5th Cir.), *cert. denied* 54 L.Ed.2d 174 (1977), each corporate defendant in the prior criminal antitrust action had obtained transcripts of grand jury testimony of its own employees pursuant to a motion filed in the criminal action under Federal Rule of Criminal Procedure 16(a)(1)(A). As part of its discovery program in its civil antitrust case, the State of Texas moved to discover those transcripts. The Fifth Circuit reversed the District Court's order granting disclosure, holding that a "particularized need" still must be shown in order to obtain the release of the grand jury transcripts, even though those transcripts had already been released to the defendants in the prior criminal action who were, in fact, the grand jury witnesses' corporate employers. The Fifth Circuit based its holding on the policy reasons behind grand jury secrecy, stating that "the one most pertinent to this case is the desire to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation."



In direct conflict is the Seventh Circuit's decision in this case, which has replaced the "particularized need" or "compelling necessity" test set forth in *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 2 L.Ed.2d 1077 (1958) with a standard that determines disclosure based on determining "whether the District Judge abused his discretion in weighing the usefulness to the plaintiffs of the material released against any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances." In complete contrast to the Fifth Circuit, the Seventh Circuit ordered disclosure of the grand jury transcripts even though no corporate employer had ever seen the grand jury testimony of its employees, and even though the grand jury transcripts were sought by the plaintiffs in connection with pretrial discovery proceedings and without any showing whatsoever that the transcripts were needed to impeach a witness, or to refresh the recollection of a witness, or that other avenues of discovery were closed. The Fifth Circuit *denied* disclosure despite the fact that the grand jury transcripts had been disclosed to the witnesses' corporate employers, and the Seventh Circuit *ordered* disclosure despite the fact that the grand jury transcripts were *not* disclosed to the witnesses' corporate employers — the conflict is complete.

On October 11, 1977, this Court denied a petition for writ of certiorari to review another decision of the Seventh Circuit encaptioned *Illinois* v. *Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied* 54 L.Ed.2d 174 (1977). Although the Court of Appeals for the Seventh Circuit recognized its decision was inconsistent with that of the Fifth Circuit (*see* 552 F.2d at 778 n.15), it nonetheless ordered disclosure of grand jury transcripts to the State of Illinois simply for pretrial discovery purposes in a civil antitrust action brought by the State where the corporate employers in the

prior criminal action had obtained copies of the grand jury transcripts of their own employees. The conflict between the Fifth and Seventh Circuit presented by the instant Petition for Writ of Certiorari, however, runs even deeper than that presented by the prior petition. Here, the Seventh Circuit has approved disclosure of grand jury transcripts even though a major policy reason for the secrecy of grand jury proceedings still exist — to protect grand jury witnesses from retaliation by their employers and others and to thereby encourage free and untrammelled disclosures to the grand jury. Thus, the reason for not disclosing grand jury transcripts is even stronger than in the situation before the Fifth Circuit, but nonetheless, the Seventh Circuit has taken a completely opposite position.

Accordingly, this conflict justifies the grant of certiorari to review the judgment below.

## II.

## THE DECISION BELOW HOLDING THAT GRAND JURY TRANSCRIPTS SHOULD BE DISCLOSED FOR PURPOSES OF DISCOVERY IN CIVIL PROCEEDINGS INVOLVES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE EFFECTIVE FUNCTIONING OF FUTURE GRAND JURIES AND CONCERNING THE IMPACT THE RELEASE OF GRAND JURY TRANSCRIPTS IN THESE CIRCUMSTANCES HAS ON PUBLIC POLICIES FAVORING DISCLOSURE TO CRIMINAL DEFENDANTS.

The decision below fails to follow the policy of grand jury secrecy and the role set out for the grand jury by this Court's decisions in *Pittsburgh Plate Glass Company* v. *United States,* 360 U.S. 395, 3 L.Ed.2d 1323 (1959) and *United States* v. *Procter & Gamble Co., supra.* Those cases have pointed out that the reason behind the policy of grand



jury secrecy that survives the grand jury's term and the criminal proceeding is the need to protect the grand jury witness from retaliation, and to thereby assure that witnesses before future grand juries step forward and testify freely. Accordingly, this Court has always required a "particularized need" or "compelling necessity" to be shown in order to permit the disclosure of grand jury transcripts. As stated in *United States* v. *Procter & Gamble Co., supra,* 356 U.S. at 682, 2 L.Ed.2d at 1082:

> The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This "indispensable secrecy of grand jury proceedings" . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.

The record below discloses that no corporate employer has seen the grand jury testimony of its own employees. Thus, the major policy reason set forth in *Procter & Gamble* for preserving the secrecy of grand jury proceedings still exists. However, under Pretrial Order 18 and the Seventh Circuit's decision, the testimony of any grand jury witness that was disclosed in the prior criminal action to any defendant for whatever reason now becomes available to the Plaintiffs in the civil action simply to facilitate their general pretrial discovery. Since it is established that it is unfair to permit one side "to have exclusive access to a storehouse of relevant fact," *Dennis* v. *United States,* 384 U.S. 855, 873, 16 L.Ed.2d 973, 985 (1966), the testimony of a grand jury witness now becomes accessible to

that witness' corporate employer. *See also Illinois* v. *Sarbaugh, supra,* 552 F.2d at 776. American Can Company, which has never seen the grand jury testimony of its employee, Petitioner Richard Eldh, now has access to that testimony. And where before the testimony of grand jury witnesses were disclosed to only three corporate defendants in the prior criminal action pursuant to public policy favoring such disclosures, that testimony will now be spread of record to a large segment of the folding carton industry, as it will now be disclosed to at least the 130 corporations which constitute the individually named corporate Plaintiffs in the civil actions below, and to the additional twenty-five corporations which form the civil defendants below.

In contrast to the Seventh Circuit's decision, the Second Circuit in *Baker* v. *United States Steel Corp.,* 492 F.2d 1074 (2d Cir. 1974) has also indicated that the secrecy of grand jury proceedings can be broken and grand jury transcripts disclosed only upon a showing of a "particularized need" or "compelling necessity." In *Baker,* a private civil antitrust suit was filed in the District of Connecticut. This civil suit resulted from a criminal indictment against the same defendants which had been filed in the Southern District of New York and which was terminated by pleas of *nolo contendere.* The plaintiffs in the civil action in Connecticut sought transcripts of testimony given by witnesses before the grand jury in the New York District, who at the time of testifying were officials of the defendants, but who at the time of the civil action were deceased.

Although the plaintiffs were unable to demonstrate a compelling need for the transcripts, they succeeded in persuading the Connecticut District Court that the compelling need test should not be applied. Lacking custody or control over the New York District's grand jury minutes,



the Connecticut District Court requested the New York District Court to forward the grand jury transcripts to it. After a hearing on the request before the New York District Court, that Court agreed to honor the request. The defendants then appealed both the New York District Court's decision to honor the request, and the Connecticut District Court's decision to release the grand jury transcripts.

In a 2-1 decision, the Second Circuit dismissed the appeals, holding that neither decision was a final, appealable order. The Second Circuit, however, did not want the dismissal of the appeals to be construed as approval of the Connecticut District Court's reasons for releasing the transcripts, and the majority requested that District Court to reconsider its ruling. The Court stated at 492 F.2d at 1079:

> Having in mind that disclosure of grand jury proceedings may substantially inhibit the deliberations of other grand juries and the willingness of witnesses to appear and testify freely in the future, we would not want our dismissal of these appeals to be construed as approval of the standard of "slight need" formulated by the district court. . . . [I]t seems to us that where plaintiffs' predicament is to such a large extent of their own making and the use to which they could put the transcripts so speculative, greater weight should be given to the fact that, while some of the reasons for maintaining secrecy no longer exist in this case, other traditional reasons survive. As the Supreme Court stated in *United States* v. *Procter & Gamble Co., supra,* for instance, the institution of the grand jury "might suffer if those testifying today knew that . . . their testimony would be lifted tomorrow," 356 U.S. at 682, 78 S.Ct. 986. For the most part the decisions relied upon by the district court in support of its new "slight need" standard reveal the existence of more

> specific, forceful and persuasive exigencies than those shown here, which were described by the courts in terms of compelling or particularized need. For instance, disclosure has been permitted to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony. . . . No such situation exists here. Nor do these authorities support the proposition that grand jury transcripts should be released to permit *general discovery* in a civil case, as distinguished from satisfying the compelling need for impeachment or refreshment of a witness' recollection, without any showing that other possible sources have been exhausted or that the transcripts, if disclosed, would not be publicized.

While dissenting Judge Lumbard disagreed with the majority and believed that the order of the District Courts were final and appealable, he was in full agreement with the majority that it was improper for the Connecticut District Court to order release of the grand jury testimony. Judge Lumbard stated at 492 F.2d at 1080:

> The majority agrees that it was improper for Judge Newman to order the release of secret grand jury testimony here simply on the showing of a "slight need" for such testimony by the plaintiffs. While the "particularized need" test of *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.ed. 2d 1323 (1959) and *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 682-683, 78 S. Ct. 983, 2 L.ed. 2d 1077 (1958), has been eroded to some extent, no previous decision of this court has endorsed a standard which would permit the breach of grand jury secrecy merely for general discovery purposes. Such a lenient standard would seriously jeopardize the effective functioning of grand juries. Ready access to grand jury minutes would likely have the effect in the future of



substantially inhibiting the deliberations of the grand jury, and, perhaps more significant, the willingness of witnesses to appear and testify freely. With these consequences in mind, this court has required a showing of exigent circumstances before overriding the strong policy in favor of grand jury confidentiality. See, e.g., *United States* v. *Youngblood,* 379 F.2d 365, 367 (2d Cir. 1967), *Atlantic City Electrical Co.* v. *A. B. Chance Co.,* 313 F.2d 431, 434 (2d Cir. 1963).

The plaintiffs have failed to point to such exigent circumstances here in support of disclosure. They seek to use secret grand jury testimony to obtain "leads" to competent evidence that could then be used in this civil suit against the defendants. No showing, however, has been made that the usual channels of discovery have proved fruitless or have even been diligently pursued. As the majority notes, plaintiffs have yet to exhaust "the deposing of other live and available witnesses who might provide the 'leads' plaintiffs seek to gain from disclosure of the grand jury testimony of the deceased officials." . . . .

Since the plaintiffs sought the grand jury transcripts of witnesses who were deceased, the policy reasons behind grand jury secrecy would not be applicable. Nonetheless, the Second Circuit concluded that the transcripts should not be disclosed. Here, in addition to the reasons set forth by the Second Circuit, another major policy reason to preserve grand jury secrecy still exists — to protect employees from retaliation by their employers and to thus assure that future grand jury witnesses will testify freely. Nonetheless, the Seventh Circuit, in conflict with the opinion of the Second Circuit, has ordered disclosure.

The opinions of the Second, Fifth and Seventh Circuit Courts of Appeals demonstrate that the issue of disclosure of grand jury transcripts often arises in the lower courts with conflicting results. In addition, this same issue is

presently awaiting decision by the United States Court of Appeals for the Ninth Circuit in *Douglas Oil Co.* v. *Petrol Stops Northwest,* No. 77-2305, argued February 7, 1978. This uncertainty surrounding the disclosure of grand jury transcripts and the frequency with which it arises reflects the fact that many lower courts believe that this Court's decisions in *Pittsburgh Plate Glass* and *Procter & Gamble* have been eroded by language in *Dennis* v. *United States, supra.* It also reflects the fact that this Court has not had occasion to address the precise issue preented in this case, and has not since 1966 had occasion to address itself to the disclosure of grand jury transcripts in general.

Since it is a common occurrence for private civil antitrust actions to follow on the heels of criminal antitrust actions, the issue of disclosure of grand jury transcripts poses important and recurring problems which have not been, but should be, settled by this Court. The case below raises the following significant questions of federal law:

1. To what extent does the disclosure of grand jury transcripts for discovery purposes and without a demonstration of a "particularized need" or "compelling necessity" impair the effective functioning of future grand juries?

As this Court has recognized in *Pittsburgh Plate Glass,* and *United States* v. *Procter & Gamble Co.,* one of the purposes behind grand jury secrecy is to encourage witnesses to step forward and testify freely, and the grand jury is free from technical rules and may return indictments based on hearsay. The decision of the Court of Appeals for the Seventh Circuit undermines the effective functioning of future grand juries because testimony of witnesses will be parsimonious and curtailed when they know that their testimony will be in the hands of their corporate employers and in the hands of civil antitrust



plaintiffs within their industry without any showing of need.

2. Does the disclosure of grand jury transcripts in these circumstances impermissibly hinder public policies favoring disclosure to criminal antitrust defendants and also unconstitutionally hinder a criminal antitrust defendant's right to counsel?

The Jencks Act, *Brady* v. *Maryland,* and Federal Rule of Criminal Procedure 32(c)(3)(A) require disclosure of, respectively, statements in possession of the government of a person called as a witness at the criminal trial, exculpatory material, and pre-sentence investigations. Moreover, under Federal Rule of Criminal Procedure 16(a)(1)(A), a corporate defendant is entitled to inspect the grand jury testimony of any witness who was, at the time of his testimony, so situated as an officer or employee as to have been able to legally bind the corporation with respect to the business activity which is the subject of the indictment. The decision of the Courts below abrogates these discovery rights mandated by Congress because for a defendant to look at the transcripts in preparation of a criminal defense is to turn the transcripts over to civil antitrust plaintiffs. This is a result never contemplated by Congress. And by so denying the criminal defendant the right to inspect the grand jury transcripts in preparation for its or his or her defense, the decision of the Court of Appeals also impermissibly burdens the criminal corporate defendant's constitutional right to effective assistance of counsel. *See United States* v. *Jackson,* 390 U.S. 570, 20 L.Ed.2d 138 (1968); *Hancock Brothers, Inc.* v. *Jones,* 293 F.Supp. 1229 (N.D.Cal. 1968).

These reasons further justify this Court granting certiorari to review the decision of the Court of Appeals below in order to correct and settle important questions of federal law.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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# APPENDIX

## APPENDIX A

Unpublished Order Not To Be Cited Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued November 11, 1977)
December 1, 1977

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. CHARLES E. WYZANSKI, JR., Senior District Judge*

---

No. 77-1674, 1697 & 1798

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ALTON BOX BOARD COMPANY, et al.,
Defendants-Appellants.

---

IN RE FOLDING CARTON ANTITRUST LITIGATION

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 76 CR 199
Master File No. MDL 250
EDWIN A. ROBSON and HUBERT L. WILL, *Judges*.

---

* Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

## ORDER

The Court, having read the briefs, addressed itself to the records, and heard oral argument, announced its decision in open court, except for possible modification of one of the orders appealed from. Counsel were asked to inform the Court, within one week, of their positions with respect to the possible modification. Counsel have done so.

No. 77-1697 and No. 77-1798 are appeals from an order, P.T.O. No. 18, dated June 30, 1977. It was issued in pretrial proceedings in a number of civil actions under the antitrust laws, referred to the Northern District of Illinois by the Panel for Multi-District Litigation (M.D.L. 250). The defendants in the civil actions had also been defendants in a related criminal case in the Northern District of Illinois, terminated on pleas of *nolo contendere* except for certain defendants who stood trial.

P.T.O. No. 18 ordered that the government make available to the parties (actually only to counsel of record) certain grand jury materials, *i.e.*, (1) portions of transcripts previously identified by the government's log (as amended) of grand jury transcripts inspected by defendants, and (2) statements submitted to the court in connection with sentencing in the criminal case. The grand jury testimony (1) was that of witnesses whose testimony had been disclosed by the government to any defendant or defendant's counsel. The statements (2) contain excerpts from and summaries of grand jury testimony, attributed to named witnesses in some instances. Protective provisions were imposed. Certain documents in the possession of the government were also ordered turned over to counsel.

In No. 77-1697 defendants in the civil cases, who had also been defendants in the criminal case, appealed. In



No. 77-1798, Richard Eldh, a witness, appealed as to his own testimony. The government did not appeal, but argued in support of the order.

The members of the panel concluded that P.T.O. No. 18 is a final and appealable order, deciding and terminating an application for disclosure of matters occurring before a grand jury of the district, pursuant to Rule 6 (e), Fed.R.Crim.P. The motion to dismiss appeals No. 77-1697 and 77-1798 is denied.

No. 77-1674 is an appeal by the defendants from parts of P.T.O. No. 14. The order set the matter for hearing June 24, 1977, the hearing underlying the entry of P.T.O. No. 18. The parts appealed from required the government to supply certain information, give notices, and the like. These portions were clearly preliminary and not final, and No. 77-1674 cannot stand as an independent appeal.

This Court has recognized that indicted persons now defending a civil action involving the same facts have an interest sufficient to satisfy the requirement of standing and to entitle them to intervene in opposition to a motion for disclosure (and to appeal from an adverse order). *State of Illinois* v. *Sarbaugh*, 552 F.2d 768, 773 (7th Cir. 1977). Defendants have argued only the general principles underlying grand jury secrecy.

Plaintiffs offered, in their brief, in order to minimize any danger of retaliation by any defendant against a witness-employee, to have the protective order preclude access to the materials of defendants' corporate officers. After argument, plaintiffs filed a proposed amendment which defendants oppose. After further reflection, we have decided against any modification.

As indicated in our announcement in open court after oral argument, the members of the panel are convinced that the ultimate question on these appeals is whether the District Judge abused his discretion in weighing the usefulness to plaintiffs of the material released against any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances. Appellants have not persuaded us that his discretion was abused.

Accordingly, the Clerk of this Court is directed to enter judgment dismissing Appeal No. 77-1674 and affirming the order appealed from in Nos. 77-1697 and 77-1798. Costs are awarded to plaintiffs and against appellants in 77-1697, but not against appellant Eldh.



UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 22, 1978

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. CHARLES E. WYZANSKI, JR., Senior District Judge*

---

No. 77-1697 and 77-1798

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ALTON BOX BOARD COMPANY, et al.,
Defendants-Appellants.

---

IN RE FOLDING CARTON ANTITRUST LITIGATION

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 76 CR 199
Master File No. MDL 250
EDWIN A. ROBSON and HUBERT L. WILL, *Judges.*

---

* Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

## ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed by counsel for the defendants-appellants in the above-entitled matter, the judges on the panel have voted to deny the petition for rehearing, and no judge** in regular active service has requested a vote on the suggestion of rehearing *in banc*. Accordingly,

IT IS ORDERED that the petition for rehearing and the suggestion of rehearing *in banc* are DENIED.

** Circuit Judge Philip W. Tone did not participate in the consideration of the suggestion of rehearing *in banc*.



UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 1, 1978

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

---

No. 77-1697

---

IN RE FOLDING CARTON
ANTITRUST LITIGATION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ALTON BOX BOARD COMPANY, et al.,
Defendants-Appellants.

---

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76-Cr-199
Judge Will

---

On consideration of the "MOTION TO STAY MANDATE" filed herein on February 27, 1978 by counsel for the defendants-appellants,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED and the mandate of this court is stayed up to and including March 30, 1978. The court wishes to indicate it will not automatically renew the stay of mandate beyond the time granted herein.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Master File — No. MDL 250

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IN RE:
FOLDING CARTON ANTITRUST LITIGATION,

This Document Relates to All Actions

---

PRETRIAL ORDER NUMBER 18

ORDER WITH RESPECT TO GRAND JURY TRANSCRIPTS AND MATERIALS BASED UPON OR DERIVED THEREFROM

Plaintiff in MDL 250 having filed a motion seeking an order upon the government to produce certain grand jury materials, including certain transcripts of proceedings before the grand jury which returned the indictment in 76 CR 199 and certain other documentary material based upon or derived from such grand jury proceedings, to which motion the defendants in DL 250, certain individual defendants in 76 CR 199, and various witnesses before the grand jury have objected; and

Plaintiffs in MDL 250 having served subpoenas upon Mr. John Sarbaugh, Chief of the Midwest Office of the Antitrust Division, for the giving of a deposition in MDL 250 and for the production at that deposition of similarly described grand jury materials, and a motion to quash said subpoena having been filed by defendants in MDL 250; and

Government counsel in 76 CR 199 having moved for an order vacating impounding orders theretofor entered by Judge Parsons with respect to certain papers and proceedings in 76 CR 199; and

Chief Judge James B. Parsons of this court having entered orders delegating and transferring to the judges acting in MDL 250 his power and authority with respect to the continued secrecy or release of said grand jury materials; and

All parties and persons having an interest in said matters having been fully heard both orally and pursuant to written documents filed by them,

IT IS HEREBY ORDERED,

1. Subject to the terms of the Protective Order set forth in paragraph 3 hereof the following described grand jury materials shall be made available by the government to the parties for inspection and copying:

(a) Those portions of the transcripts of proceedings before the grand jury which were identified by government counsel in the document dated May 6, 1977, captioned both in 76 CR 199 and MDL 250 and filed with this Court, entitled "Government's Log of Grand Jury Transcripts Inspected By Defendants", as amended or modified by subsequent letters from government counsel to this Court and to counsel;

(b) Written statements prepared by government counsel and submitted to Judge Parsons in connection with the sentencing procedures in 76 CR 199, purporting to describe the participation by defendants in that action in the matters there charged.



2. Plaintiffs' motion to direct the United States Department of Justice, Antitrust Division to turn over to plaintiffs' and defendants' attorneys for inspection and copying statements by the defendants in mitigation submitted by corporate or individual defendants in 76 CR 199, and transcripts of proceedings *in camera* before Judge Parsons in that matter, is denied. These statements in mitigation and transcripts of proceedings *in camera* shall be removed from the public files and not be released to the parties, and the plaintiffs are precluded from securing access to or inspecting such statements without further order of the Court.

3. Unless otherwise hereafter ordered by this Court, the following protective provisions shall apply to the production, inspection and use of the grand jury materials described in paragraph 1 above.

(a) Such grand jury materials shall be utilized only for the limited purposes set forth herein;

(b) Such grand jury materials shall be released only to (i) the Coordinating Secretary for plaintiffs' Executive Committee, and (ii) the Coordinating Secretary for defendants' Executive Committee, for copying by them and for deposit in the document depositories maintained by plaintiffs and defendants, respectively;

(c) Such grand jury materials shall be available only to counsel of record for parties in these cases and shall not be made available to any other persons without further order of Court. No copies shall be made by any such counsel except as needed for the limited purposes set forth in subparagraph (d) hereof. The administrators of the respective document deposi-

tories shall maintain logs showing to whom and when each item of grand jury material (or portion thereof) is shown, and shall note upon such log the identity of any counsel who make copies and a specific description of what was copied;

(d) Such grand jury materials so released by order of this Court shall be used only in this litigation, and only for the purposes of impeachment of a witness, refreshing a witness' recollection as to matter to which he formerly testified, or testing a witness' credibility as to matters to which he formerly testified;

(e) The logs provided for in subparagraph (c) hereof shall be available for inspection and copying during normal business hours by any counsel of record in these cases, and any such counsel may lodge a copy of all or any part of such a log with this Court.

4. Plaintiffs' motion to direct the United States Department of Justice, Antitrust Division to turn over to the plaintiffs' and defendants' attorneys for inspection and copying third party documents which are presently in possession of the Antitrust Division is granted, with the following exceptions:

(i) the letters of transmittal by Kimberly Clark to the Department of Justice shall be withheld;

(ii) the documents submitted by Procter and Gamble need not be produced for inspection and copying at this time in view of representations made by counsel that the production of these documents to the plaintiffs and defendants may be resolved by agreement.

The third party documents turned over to the parties for inspection and copying as provided in this paragraph 4



shall be subject to the protective order of Paragraph XIX of P.T.O. No. 1 and shall be only made available to attorneys participating in the prosecution or the defense of these actions and such attorneys are precluded from making such documents available to their principals.

5. This Order shall be effective at the close of business July 8, 1977.

ENTER this 30th day of June, 1977.

.....

District Judge

Supreme Court, U. S.
FILED
MAY 1 1978
RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-1390**

ALTON BOX BOARD COMPANY, et al.
and RICHARD ELDH,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

IN RE FOLDING CARTON ANTITRUST LITIGATION—MDL 250

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-1390**

ALTON BOX BOARD COMPANY, et al.
and RICHARD ELDH,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

IN RE FOLDING CARTON ANTITRUST LITIGATION—MDL 250

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**Brief for Respondent
Plaintiffs in Opposition**

Respondents, plaintiffs in *In Re Folding Carton Antitrust Litigation,* MDL 250 (N.D. Ill.), respectfully oppose the petition for writ of certiorari filed by defendants. This Petition seeks review of the December 1, 1977 Order of the United States Court of Appeals for the Seventh Circuit affirming the District Court's discretionary ruling granting plaintiffs limited access to grand jury testimony which had previously been disclosed to certain counsel for defendants and their corporate officers and managers.

## COUNTER STATEMENT OF THE QUESTION PRESENTED

In light of this Court's refusal seven months ago to consider two petitions which presented the identical question advanced herein, should this Court now review the District Court's exercise of its discretion? *Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied* ..... U.S. ....., 54 L.Ed. 2d 174 (1977), and *Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied* ..... U.S. ....., 54 L.Ed. 2d 174 (1977).



## COUNTER STATEMENT OF THE CASE

Defendants' statement of the case outlines the history of the proceedings below. However, defendants' suggestion that the materials ordered released to plaintiffs' counsel had not previously been widely disclosed is incorrect. Following is a chart which identifies the corporate defendants, their officers, and managing agents who examined grand jury testimony released during the criminal action, and lists the grand jury testimony reviewed by each.

## PRIOR DISCLOSURE OF GRAND JURY TESTIMONY

### Defendant Corporation and Officers and Managers to Whom Grand Jury Transcripts or Excerpts Thereof Were Revealed

WEYERHAEUSER

INTERNATIONAL PAPER COMPANY
- ERNEST J. CURTIS—Regional General Manager, Folding Carton and Label Division
- GEORGE F. WOHLGEMUTH—Regional Sales Manager, Folding Carton and Label Division
- FRED L. BOHLKE—Regional General Manager, Folding Carton and Label Division
- WILLIAM C. WARD—Administrative Operations Sales Manager

GULF STATES

CONSOLIDATED PACKAGING
- MELVIN E. RIECKE—Vice President, Boxboard and Folding Carton Division

ALTON BOX BOARD COMPANY
- PAUL H. WOLFF—Vice President and General Manager, Carton Division

AMERICAN CAN
- DONALD H. WEDIN—Director of Sales & Marketing Dairy and Frozen Food Packaging

CHAMPION INTERNATIONAL

CONTAINER CORPORATION OF AMERICA
- R. HARPER BROWN—President and Chief Operating Officer
- T. M. LITTLE—General Manager, Carton Division
- JACK D. TOVIN—Vice President, Carton Division



| Witness' Grand Jury Testimony | Witness' Corporate Affiliation |
|---|---|
| Meadows | Container Corp. |
| Watt | Container Corp. |
| Blankenheim | Diamond |
| Lambert | St. Regis & Weyerhaeuser |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Hencel | Weyerhaeuser |
| Shepard | International Paper |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Steele | International Paper, F. N. Burt |
| Bell | Diamond |
| Meadows | Container Corp. |
| Empkie | Container Corp. |
| Stuberg | Fibreboard |
| Williams | International Paper |
| Watt | Container Corp. |
| Eldh | American Can |
| DeFazio | International Paper |
| Meadows | Container Corp. |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Blankenheim | Diamond |
| Emmert | International Paper |
| Lambert | St. Regis & Weyerhaeuser |
| Bell | Diamond |
| Jewell | Container Corp. |
| Watt | Container Corp. |
| Williams | International Paper |
| Hencel | Weyerhaeuser |
| Eldh | American Can |
| Shaffer | Federal Paperboard & Container Corp. |
| DeFazio | International Paper |
| Blankenheim | Diamond |
| Stuberg | Fibreboard |
| Eldh | American Can |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Blankenheim | Diamond |
| Lambert | St. Regis & Weyerhaeuser |
| Watt | Container Corp. |
| Hall | Container Corp. |
| Empkie | Container Corp. |
| Meadows | Container Corp. |

## PRIOR DISCLOSURE OF GRAND JURY TESTIMONY

### Defendant Corporation and Officers and Managers to Whom Grand Jury Transcripts or Excerpts Thereof Were Revealed

DIAMOND INTERNATIONAL
- RICHARD A. BUCKMAN—Sales Manager, N. Central Area
- JAMES A. GAGE—Sales Manager, Chicago Area
- WAYNE GILSDORF—Sales Manager, Central Area
- JAMES A. HANNIGAN—Sales Manager, Detroit Area
- WILLIAM J. KOSLO—Executive Vice President
- ROBERT D. WEYMAN—Sales Manager, Retail Area
- PAUL WILCH, JR.—Division Vice President

FEDERAL PAPERBOARD
- CARL M. DEFARIA—Vice President and Regional General Manager, Folding Carton Division
- CLARK W. FISHER—Vice President and General Manager, Folding Carton Division

FIBREBOARD
- WILLIAM S. HART—Director National Sales, Paperboard and Packaging

HOERNER WALDORF
- JAMES C. DICKERT—Sales Manager, Chicago
- JAMES D. MAHER—Sales Manager, St. Paul
- M. J. WIERSUM—Chief Divisional Officer, Folding Cartons

MICHIGAN CARTON
- ROBERT RYAN—Vice President, Carton Sales

PACKAGING CORPORATION OF AMERICA
- GEORGE V. BAYLY, SR.—Senior Vice President
- CHARLES L. HAMILTON—Vice President, Paperboard Products Area I
- J. A. NEUMAN—Plant General Manager
- ROBERT F. KRAUSE—Vice President, Area II

POTLATCH CORPORATION
- WILLIAM O. BRITTAIN—General Manager, Louisville
- VERN A. KEPFORD—General Manager, National Sales, Packaging Division

ST. REGIS
- PAUL J. VAN KEUREN—General Manager, Folding Carton Division

(This chart was derived from the Government's Log of Grand Jury Transcript Inspected by Defendants and Government's Log of Grand Jury Transcript Quoted in Government's Statements Seen By Defense Counsel attached in the Appendix hereto)



| Witness' Grand Jury Testimony | Witness' Corporate Affiliation |
|---|---|
| Bell | Diamond |
| Steele | International Paper, F. N. Burt |
| Lynn | International Paper |
| Blankenheim | Diamond |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Lambert | St. Regis & Weyerhaeuser |
| Turvey | Weyco Paperboard Div. Graphic Cards, Chicago |
| Coleman | Brown Company National Accounts Serv. |
| Blankenheim | Diamond |
| Eldh | American Can |
| Bell | Diamond |
| Doman | Container Corp. |
| Gort | Packaging Corp. |
| Watt | Container Corp. |
| Turvey | Packaging Corp. |
| Frey | Packaging Corp. |
| Mumaw | Packaging Corp. |
| Gort | Packaging Corp. |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Baker | Container Corp. & Potlatch |
| Lynn | International Paper |
| Robertson | Weyerhaeuser, International Paper & Diamond |
| Stuberg | Fibreboard |
| Williams | International Paper |
| Watt | Container Corp. |
| Eldh | American Can |
| DeFazio | International Paper |
| Lambert | St. Regis, Weyerhaeuser |
| Blankenheim | Diamond |
| Meadows | Container Corp. |
| Shaffer | Federal Paperboard and Container Corp. |
| Bell | Diamond |

In addition, at the time of the District Court's ruling permitting plaintiffs access to previously disclosed grand jury testimony, the record reflected that:

(1) Defendants had refused to answer interrogatories requesting identification of meetings at which their employees had the opportunity to discuss the prices of folding cartons, relying on their employees' alleged Fifth Amendment privilege;

(2) Plaintiffs intended to call grand jury witnesses as witnesses at deposition; and

(3) In the three depositions of grand jury witnesses taken by plaintiffs to that date, the deponents had refused to testify asserting alleged Fifth Amendment rights.

Under these circumstances, the District Court found that access to previously disclosed grand jury testimony for "impeachment of a witness, refreshing a witness' recollection as to a matter to which he formerly testified, or testing a witness' credibility" was warranted. (See Pretrial Order No. 18, dated June 30, 1977, attached as Appendix B to Petition for Writ of Certiorari).

## SUMMARY OF REASONS FOR DENYING THE WRIT

1. Each of the four Circuit Courts of Appeals (the Second, Fifth, Seventh and Ninth Circuits) which have had an opportunity to apply the standard enunciated by this Court in *United States v. Procter & Gamble,* 356 U.S. 677 (1958), to varying factual situations has ruled that it is within the District Court's sound discretion to permit access to grand jury transcripts. There is no real conflict over an important issue of federal law among the circuits.

2. The decision below, permitting restricted access to grand jury testimony, is consistent with this Court's decision in *United States v. Procter & Gamble, supra,* and was not an abuse of the District Court's discretion.



## REASONS FOR DENYING THE WRIT

### I.

### The Decision of The Seventh Circuit, Affirming the District Court's Restricted Release of Previously Revealed Grand Jury Testimony, Is in Accord with the Decisions of This Court as Applied By Other Circuit Courts of Appeal.

Defendants allege a conflict among the Circuit Courts of Appeal regarding the diminution of the degree of particularized need required to justify release of previously disclosed grand jury testimony. Each of the appellate courts confronted with this issue has applied the standard of *United States v. Procter & Gamble, supra,* in determining whether the district court properly exercised its discretion, under the circumstances of the case, in deciding the propriety of affording access to grand jury testimony. The Seventh, Second and Ninth Circuits, based on the reasoning of this Court in *Procter & Gamble,* agree that once grand jury testimony has been disclosed, a diminished need may be demonstrated by the party seeking access. The Fifth Circuit, while recognizing that there are circumstances which warrant disclosure of grand jury testimony (i.e., to impeach or refresh the recollection of a deposition witness) finds that a general discovery request is insufficient to outweigh the policy reasons underlying grand jury secrecy.

Considering that the decision to provide access to grand jury testimony is one resting on the sound discretion of the district court, the present Petition does not involve important issues of federal law or a real and embarrassing conflict of opinion and authority among the Circuit Courts, and is, therefore, not a proper subject for review. *Layne & Bowler Corporation v. Western Well Works, Inc.,* 261

U.S. 387 (1923); *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). Whatever variance may exist among the Circuits is factual, inherent in the application of discretionary rules.

Having denied a petition for writ of certiorari last year in *Illinois v. Sarbaugh, supra,* 54 L.Ed.2d 174 (1977), and in *Texas v. United States Steel Corp., supra,* 54 L.Ed.2d 174 (1977), in factual situations similar to the instant proceeding, the Court should deny this Petition.

## II.

### It Was Not an Abuse of Discretion for the District Court to Order Release of Grand Jury Transcripts Previously Disclosed to Defendants and Their Corporate Officers and Managers.

*United States v. Procter & Gamble, supra,* upon which defendants rely, presented the Court with a factual situation where the grand jury had not returned an indictment, and grand jury testimony had been released previously. The Seventh Circuit, in both its affirmance of the District Court's Pretrial Order No. 18 and *State of Illinois v. Sarbaugh, supra,* faced factual situations where grand juries had returned criminal indictments *and* the corporate defendants, their officers and managers had extensive access to grand jury testimony. At the time plaintiffs sought access to grand jury testimony, the criminal proceedings had concluded.

In *Sarbaugh, supra,* 552 F.2d at 775, the Seventh Circuit applied the *Procter & Gamble* standard, finding that the only policy reason for grand jury secrecy which survives the conclusion of criminal proceedings is the need to protect witnesses from retaliation. The *Sarbaugh* court stated that the force of this remaining reason is diminished when disclosure has been made to the corporate employer "who has the greater incentive and power to retaliate."



Id. at 775. In both *Sarbaugh* and the instant proceeding, such disclosures through extensive debriefing, cooperative efforts among corporate counsel, and actual viewing of grand jury testimony by the corporate defendants and their officers and managers outweighed any imagined fear of reprisals.

The *Sarbaugh* court also sought to protect the grand jury witnesses from "potential adverse effects on . . . future relationships with members of the industry." Id. at 775. However, in this proceeding, that policy reason has diminished importance since the revealed testimony was from witnesses other than the corporate defendants' own employees.

The Seventh Circuit found that sufficient need for disclosure may arise "from a litigant's interest in securing accurate and truthful testimony from witnesses", and that if a grand jury witness is scheduled to testify either at trial or by deposition, in the interests of judicial economy, his grand jury testimony should be made available. Id. at 775

The decision of the Court of Appeals for the Second Circuit in *Baker v. United States Steel Corporation,* 492 F.2d 1074 (2nd Cir. 1974), although cautioning the District Court, in dicta, that the dismissal should not be "construed as approval of the standard of 'slight' need formulated by the district court", recognized that "some relaxation" of the particularized need standard might be justified where prior disclosure of grand jury testimony had been made. *Baker, supra,* 492 F.2d at 1079, citing as an example *United States Industries, Inc. v. United States District Court,* 345 F.2d 18, 21 (9th Cir.), cert. denied 382 U.S. 814 (1965)

The Ninth Circuit in both its *U.S. Industries, Inc., supra,* and *Petrol Stops Northwest v. United States,* 1978-1 Trade Cases ¶ 61,935 (9th Cir. 1978) decisions, reasoning from

*Procter & Gamble,* also relied on a relaxed standard of need where there has been prior disclosure of grand jury testimony.

In concluding that the District Court had not abused its discretion in providing plaintiffs equal access to grand jury testimony in defendants' possession, the Ninth Circuit in *Petrol Stops Northwest v. United States, supra,* 1978-1 Trade Cases at p. 73,995, found that once grand jury secrecy is broken, and the reasons for maintaining secrecy are vitiated, "the party seeking disclosure should not be required to demonstrate a large compelling need."

Defendants point to the Fifth Circuit's opinion in *Texas v. United States Steel Corporation, supra,* to find their alleged conflict among the circuits. The Fifth Circuit decision merely stands for the proposition that access will not be granted as part of general discovery, or upon a mere showing that the other party has had prior access. Since the grand jury testimony was not being exchanged among defendants, the Fifth Circuit reasoned that the underlying reasons for grand jury secrecy were intact. As the Ninth Circuit explained in *Petrol Stops, supra,* 1978-1 Trade Cases at p. 73,955, the Fifth Circuit recognized that "disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection." The Seventh, Second and Ninth Circuits hold that once grand jury secrecy is breached, a need less than compelling must be demonstrated commensurate with the remaining policy reasons justifying grand jury secrecy.

With grand jury testimony freely available in the offices of counsel for the corporations and their managing employees, no secrecy remains. The Seventh, Second and Ninth Circuits, and various district courts throughout the country have sought to prevent the inequity of denying access to



grand jury materials to one party in a proceeding by weighing the continued need for secrecy against the need demonstrated by the party seeking disclosure. See, e.g., *City of Philadelphia v. American Oil Co.,* Civil Action No. 647-68 (D.N.J. 1971), aff'd *United States v. American Oil Co.,* 456 F.2d 1043 (3rd Cir.), *cert. denied* 409 U.S. 893 (1972); *In re Cement Concrete Block Chicago Area, Grand Jury Proceedings,* 381 F.Supp. 1108 (N.D.Ill. 1974); *In re Toilet Seat Antitrust Litigation,* 1975-2 Trade Cases ¶ 60,557 (E.D. Mich. 1975); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases ¶ 60,910 (D.Ariz. 1975); *In re Sugar Antitrust Litigation,* 1976-1 Trade Cases ¶ 60,934 (N.D.Cal. 1976); *State of Connecticut v. General Motors Corp.,* 1974-2 Trade Cases ¶ 75,138 (N.D.Ill. 1974); *Boise City v. Monroc, Inc.,* 1976-2 Trade Cases ¶ 61,178 (D.Idaho 1976).

The United States Government is the only party interested in the policy consideration that future witnesses be uninhibited during their grand jury appearances. It is significant therefore that at the April 22, 1977 pretrial conference the Government stated it had no objection to release of the transcripts in question. Furthermore, the United States supported release of the testimony before the Seventh Circuit.

Plaintiffs demonstrated on the record their need for the previously released grand jury testimony in order to depose witnesses and continue discovery. The District Court and Seventh Circuit recognized that in the facts and circumstances of these actions, where the grand jury testimony was previously revealed and is available to counsel for defendants, little secrecy remains, and it would be highly inequitable to deny plaintiffs access.

## CONCLUSION

For the above-stated reasons, plaintiffs submit that the petition for writ of certiorari should be denied.

Dated: April 29, 1978

Respectfully submitted,

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Chicago, Illinois 60611

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | |
| | ) | Criminal Action |
| ALTON BOX BOARD COMPANY, et al., | ) | No. 76 CR 199 |
| | ) | |
| Defendants. | ) | |
| | ) | |
| IN RE FOLDING CARTON ANTITRUST LITIGATION | ) | |
| | ) | |
| | ) | Master File No. |
| THIS DOCUMENT REFERS TO: | ) | MDL 250 |
| | ) | |
| ALL ACTIONS | ) | |

GOVERNMENT'S LOG OF GRAND JURY
TRANSCRIPT INSPECTED BY DEFENDANTS

The following log requested by the Court during the April 22, 1977 hearing sets forth production of grand jury transcript to defendants in the above-captioned case. The log identifies the date of production, counsel to whom production was made, the defendant(s) he represented, the witness whose transcript was produced, the company or companies that employed him, the date of the witness' grand jury appearance, and the pages of transcript inspected.

| DATE | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| /26/76 | Duane M. Kelly | Weyerhaeuser Company | James R. Meadows, Jr. Container Corporation of America | 9/30/74 | 39, line 20-<br>40, line 7;<br>42, line 1-<br>43, line 10;<br>65, line 14-<br>66, line 16 |
| | | | James R. Meadows, Jr. | 9/25/75 | 80, line 19-<br>81, line 3;<br>82, line 24-<br>83, line 6;<br>110, line 1-<br>111, line 23 |
| | | | James R. Meadows, Jr. | 12/12/75 | 2, line 1-<br>7, line 11 |
| | | | John P. Watt Container Corporation of America | 11/4/75 | 50, line 2-<br>50, line 13 |
| | | | Eugene Blankenheim Diamond International | 2/10/75 | 61, line 1-<br>62, line 11;<br>80, line 3-<br>81, line 7. |
| | | | Michael Lambert St. Regis Paper Company and Weyerhaeuser Company | 6/25/75 | 5, line 5-<br>5, line 19;<br>7, line 3-<br>8, line 1 |
| | | | Michael Lambert | 8/19/75 | 61, line 19-<br>62, line 11;<br>64, line 9-<br>64, line 15 |

[redacted]

| DATE | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| /26/76 | Duane M. Kelly | Weyerhaeuser Company | Alvin J. Robertson International Paper Company; Weyerhaeuser Company and Diamond International | 1/28/76 | 33, line 20-41, line 13; 114, line 5-114, line 11; 157, line 22 162, line 8 |
| | | | Roman V. Hencel Weyerhaeuser Company | 2/6/76 | Entire Testimony |
| | | | Roman V. Hencel | 2/10/76 | Entire Testimony |
| /26/76 | John C. Christy, Jr. | Fred L. Bohlke<br>E. J. "Bucky" Curtis<br>George Wohlgemuth | James R. Meadows, Jr. | 9/25/75 | 78-79 |
| | | | Frederick Empkie Container Corporation of America | 8/19/75 | 92-99 |
| /2/76 | John L. Conlon<br>Mark Crane<br>[Messrs. Conlon and Crane received copies of grand jury transcript for these witnesses] | Vern Kepford<br>Messrs. Crane and Conlon represent Gulf States Paper Company in the treble damage action. To our knowledge, the defendant Kepford was never employed by Gulf States. | Robert O. Stuberg Fibreboard Corporation | 11/05/75 | 12-19; 15-16; 35-37 |
| | | | James E. Williams International Paper Company | 2/5/76 | 16; 165-167; 169-178 |
| | | | James E. Williams | 2/6/76 | 15-16 |
| | | | John P. Watt | 11/04/75 | 16-43; 88-90; 120-121; 126 |
| | | | Richard Eldh American Can Company | 10/30/74 | 22-25 |
| | | | Richard Eldh | 11/6/75 | 23-27; 62 |

| | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| 76 | John L. Conlon<br>Mark Crane | Vern Kepford | Al DeFazio<br>International Paper Company | 2/6/75 | 91-97 |
| /76 | Nicholas J. Etten<br>[Mr. Etten received copies of grand jury transcript for these witnesses on 7/13/76 and 11/2/76] | Melvin Riecke | James R. Meadows, Jr. | 9/25/75 | 54; 81-82; 94-109; 119 138; 141 |
| | | | Alvin J. Robertson | 1/28/76 | 5-6; 18-25; 27-40; 44-61; 84-86; 109-110; 157; 167-169 |
| | | | Eugene Blankenheim | 2/10/76 | 18-58 |
| | | | Charles Emmert<br>International Paper Company | 12/12/74 | 4-7 |
| | | | Michael Lambert | 8/19/75-8/20/75 | 12;15-18; 24-26; 49-52; 61-67; 126 |
| | | | Howard Bell<br>Diamond International | 2/4/76 | 5-7; 59 |
| | | | Thomas Jewell<br>Container Corporation of America | 10/31/74 | 19-21 |

| ATE | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| 23/76 | Michael H. King [Copies of grand jury transcript for these witnesses were delivered to Mr. King] | Consolidated Packaging Corporation | Thomas Jewell | 10/31/74 | 19-21 |
| | | | Michael Lambert | 8/19/75-8/20/75 | 12; 15-18; 24-26; 49-52; 61-67; 126 |
| | | | James R. Meadows, Jr. | 9/25/75 | 54; 82; 94-109; 119; 138; 141 |
| | | | Alvin J. Robertson | 1/28/76 | 5-6; 10-25; 27-40; 44-61; 84-87; 109-110; 157; 167-169 |
| | | | Eugene Blankenheim | 2/10/76 | 18-57 |
| | | | Howard Bell | 12/10/75 | 20-52; 96-102; 108-109 |
| | | | Howard Bell | 2/4/76 | 5-7; 30; 59 |
| | | | Charles Emmert | 12/12/74 | 4-5; 7 |
| | | | John P. Watt | 11/4/75 | 41-42 |

| Σ | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| 4/76 | John L. Conlon<br>Mark Crane<br>[Messrs. Conlon and Crane received copies of grand jury transcript for these witnesses] | Vern Kepford | Al DeFazio | 2/6/76 | Entire Transcript |
| | | | James E. Williams | 2/5/76-2/6/76 | Entire Transcript |
| | | | John P. Watt | 11/4/75 | 122-123 |
| 14/76 | Michael H. King<br>Nicholas Etten | Consolidated Packaging Corporation; Melvin Riecke | Roman V. Hencel | 2/6/76 | Entire Transcript |
| | | | Roman V. Hencel | 2/10/76 | Entire Transcript |
| 20/76 | Michael H. King<br>Nicholas Etten<br>John L. Conlon<br>[copies produced to Messrs. King, Etten and Conlon] | Consolidated Packaging Corporation; Melvin Riecke; Vern Kepford | Eugene Blankenheim | 2/10/76 | 13-101 |
| | | | Al DeFazio | 2/6/76 | 85-99; 140-145 |
| | | | Richard Eldh | 10/30/74 | 1-28 |
| | | | Richard Eldh | 10/31/74 | 1-31 |
| | | | Richard Eldh | 11/6/75 | 2-86 |
| | | | Michael Lambert | 6/25/75 | 2-52 |
| | | | Michael Lambert | 8/19/75 | 2-130 |
| | | | James R. Meadows, Jr. | 10/30/74 | 2-69 |
| | | | James R. Meadows, Jr. | 9/25/75 | 2-141 |
| | | | James R. Meadows, Jr. | 12/12/75 | 2-14 |

| | DEFENSE COUNSEL | REPRESENTING | WITNESS | DATE OF APPEARANCE | PAGE |
|---|---|---|---|---|---|
| 0/7 | Michael H. King<br>Nicholas Etten<br>John Conlon<br>[copies produced to Messrs. King, Etten and Conlon] | Consolidated Packaging Corporation; Melvin Riecke; Vern Kepford | John P. Watt | 11/4/75 | 2-127 |
| | | | James E. Williams | 2/5/76 | 162-200 |
| | | | James E. Williams | 2/6/76 | 2-22 |
| ing al | Michael H. King<br>Nicholas J. Etten<br>John L. Conlon<br>[Messrs. King, Etten and Conlon received copies during trial] | Consolidated Packaging Corporation; Melvin Riecke; Vern Kepford | Jonathan Shaffer Federal Paperboard and Container Corporation of America | 2/4/76 | 167-168 |
| ing al | John L. Conlon<br>[Mr. Conlon received copy during trial] | Vern Kepford | Alvin J. Robertson | 1/28/76 | Entire Transcript |

Respectfully submitted,

Dated: May , 1977

D. BRUCE PEARSON

BARBARA A. MCANINCH

Attorneys, United States
Department of Justice
Antitrust Division
Washington, D. C. 20530

GOVERNMENT'S RESPONSE TO PARAGRAPH (D)
OF PLAINTIFFS' DECEMBER 1, 1976 SUBPOENA

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Donald Addington | 4001 Windsor<br>Dallas, Texas | H. Richard Wachtel | 6/18/74;<br>11/6/75 |
| Harold Dumont Austin | Burlingame, California | Malcolm Tuft<br>Brobeck, Phleger & Harrison | 6/20/74 |
| George Richard Baker | 7410 Springdale Drive<br>Louisville, Kentucky | Timothy Carr<br>Pillsbury, Madison & Sutro | 9/23/75 |
| Frank Dean Bartosic | 600 Union Street<br>Ashland, Ohio | J. Asa Roundtree | 6/25/75 |
| Howard M. Bell | 1612 Sherm Drive<br>Middletown, Ohio | Bruce A. Hecker | 12/10/75;<br>2/4/76 |
| George W. Bettke | 16 Glen Hill Road<br>Wilton, Connecticut | Glenn McGee | 6/17/74 |
| Eugene C. Blankenheim | 428 Cedar Lane<br>New Canaan, Connecticut | Gordon Spivack<br>(212-344-8480) | 2/10/76 |
| William R. Bleuel | 815 Pedham Road<br>Kingsville, Maryland | Henry L. King | 2/6/76 |
| Bobby Bowie | 19 Main Street<br>Ridgefield, Connecticut | Frederic S. Newman | 5/13/75 |
| Richard T. Clark | Sugar Loaf Shores,<br>Florida | Frederic S. Newman | 11/4/75 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Robert A. Coleman | 219 West Melody<br>Portage, Michigan | David List | 2/25/75;<br>9/23/75 |
| Robert S. Crook | 1279 Cadette Lane<br>Kalamazoo, Michigan | David List | 4/1/75 |
| Howard DeFazio | 1298 Elizabeth Drive<br>Hamilton, Ohio | Sam Betar<br>(312-236-5517) | 2/6/76 |
| Charles DeVol | 208 N. Diamond Mill Road<br>Clayton, Ohio | Malcolm Tuft | 6/17/74 |
| Herbert M. Dietzen | 2004 Wintergreen<br>Mt. Prospect, Illinois | H. Richard Wachtel | 4/2/75;<br>5/14/75 |
| J. Gregg Doman | 2069 Vermont Street<br>Rolling Meadows, Illinois | Glenn McGee | 6/26/75 |
| W. Duane Duncan | 1430 Bayberry<br>Deerfield, Illinois | E. Houston Harsha | 12/12/74 |
| Richard Eldh | 7 McLain<br>Westport, Connecticut | Henry P. Sailer | 10/30/74;<br>11/6/75 |
| Charles Emmert | 403 North Alfred<br>Elgin, Illinois | Henry King | 12/12/74 |
| Frederick D. Empkie | 600 Surry Lane<br>Glenview, Illinois | Michael V. Corrigan<br>Simpson, Thacher &<br>Bartlett | 5/13/75;<br>8/19/75;<br>12/9/75 |
| Dempwolf Frey | 2960 Claremont Road<br>Shaker Heights, Ohio | Lawrence Byrnes<br>(216-696-4200) | 2/4/76 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Bart A. Gaffney | West 226, North 1619 West North Avenue Waukesha, Wisconsin | H. Richard Wachtel | 12/11/74 |
| James R. Gardner | 990 Oak Haven Drive Roswell, Georgia | Harold Baker | 4/3/75 |
| Gordon Gort | 3430 30th Street Grandville, Michigan | E. Houston Harsha | 12/9/75 |
| James H. Groome | 4725 Milbrook Drive, N.W. Atlanta, Georgia | Harold Baker | 12/12/75 |
| Robert L. Hall | 6330 Greenwoods Pkwy. Northfield, Ohio | Glenn McGee | 5/15/75 |
| Roman V. Hencel | 12843 Beaver Dam Road St. Louis, Missouri | Michael Coffield (312-726-4646) | 2/6/76; 2/10/76 |
| William R. Hendricks | 4190 Vernon Springs Trail Atlanta, Georgia | Harold Baker | 10/30/74; 4/3/75 |
| Richard D. Hill | 59 Indian Trail Road Barrington, Illinois | Frederic S. Newman | 6/19/74; 10/30/74; 12/10/74; 4/1/75 |
| John S. Holm | 1731 Meadow Lane Holley Creek, California | Richard Calkins (312-641-2170) | 12/12/75 |
| Albert Hoopes | 923 Spring Brook Drive Cincinnati, Ohio | Henry King | 2/4/76 |
| Donald Hultstrand | 2 Robin Hill St. Louis, Missouri | Randolph Wilson Covington & Burling | 10/10/75 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| homas O. Jewell | 2572 Grand Creek Court, N.W.<br>Atlanta, Georgia | Glenn McGee | 10/31/74 |
| erbert B. Jones | 1202 Windy Gate Road<br>Towson, Maryland | Timothy Carr | 10/31/74 |
| urray Kadish | 34 Sunset Trail<br>Sparta, New Jersey | Henry King | 2/6/76 |
| aniel E. Kauffman | 4490 Powers Ferry Road<br>Atlanta, Georgia | Frederic S. Newman | 6/18/74;<br>11/4/75 |
| ichael S. Lambert | 1885 Hilltop Lane<br>Bannockburn, Illinois | H. Richard Wachtel | 6/25/75;<br>8/19/75 |
| ames LaPierre | 3599 Village Drive<br>Franklin, Ohio | Murray S. Monroe | 6/26/75 |
| ario S. Lencioni | 25W075 Merrill Drive<br>Wheaton, Illinois | Irving H. Goldberg | 12/12/74;<br>4/1/75 |
| ichard S. Longnecker | 4114 Lakeside<br>Kalamazoo, Michigan | David List | 12/11/74;<br>9/25/75;<br>12/11/75 |
| enneth W. Lynn | 2218 Brockton Drive<br>Fairfield, Ohio | Henry King | 12/6/76 |
| Ralph M. Malcolm | 1830 East Kane Place<br>Milwaukee, Wisconsin | H. Richard Wachtel | 4/2/75 |
| James R. Meadows, Jr. | 5950 Oakwood Drive<br>Lisle, Illinois | Glenn McGee | 10/30/74;<br>9/25/75;<br>12/12/75 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Garth H. Miller | 10664 Adventure Lane<br>Cincinnati, Ohio | Harold Baker | 6/17/74 |
| Norman H. Moore | 755 Coastline Drive<br>Palo Alto, California | Malcolm Tuft | 2/27/75 |
| Robert A. Morris | 135 South Elm Street<br>Hinsdale, Illinois | Glen Kuykendall<br>(503-222-5561) | 6/20/74 |
| Arthur D. Mumaw | 4871 Melrose Drive<br>Wooster, Ohio | E. Houston Harsha | 8/20/75 |
| James D. Murphy | 5 Elmhurst Avenue<br>Cincinnati, Ohio | Frederic S. Newman | 1/17/75;<br>9/24/75 |
| Minor F. Neff | 3265 South Dale Drive<br>Dayton, Ohio | David Neff<br>(616-451-2961) | 6/25/75 |
| Lee Nichols | 4120 Willowhead Way<br>Naples, Florida | H. Richard Wachtel | 10/29/74;<br>6/25/75 |
| Michael E. Noonan | 1040 W. Marietta St., N.W.<br>Atlanta, Georgia | Harold Baker | 1/17/75;<br>6/26/75 |
| Fielder A. Nordstrom | 2468 Vineyard Road<br>Movado, California | Malcolm Tuft | 2/26/75;<br>5/14/75 |
| Emerson Noyes | 65 East Scott Street<br>Chicago, Illinois | H. Richard Wachtel | 2/27/75;<br>5/14/75 |
| Michael J. O'Malley | 113 Warwick<br>Forest Park, Illinois | Glen Kuykendall<br>(503-222-5561) | 6/19/74 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| llip K. Reynolds | 547 Post Road<br>St. Charles, Illinois | Frederic S. Newman | 5/13/75;<br>9/24/75 |
| in J. Robertson | Rural Route 4<br>Box 354<br>Marion, Illinois | William Carroll, Jr.<br>(815-338-1135) | 12/9/75;<br>1/28/76 |
| ton H. Robinson | 415 El Centro Road<br>Hillsborough, California | Glenn McGee | 4/3/75;<br>11/5/75 |
| rles Ruble | 11167 Valley Springs Pl.<br>North Hollywood, California | Frank DeMarco, Jr.<br>DeMarco, Beral, Greenberg, Thrall & Slusher,<br>Los Angeles, California | 5/15/75 |
| E. Schelley | 4650 Summerset Avenue<br>Bellview, Washington | Glenn McGee | 2/25/75 |
| athan Shaffer | 12 Thunder Lake Road<br>Wilton, Connecticut | Frederic S. Newman | 2/4/76 |
| ard Shelley | 13342 Thornhill Drive<br>St. Louis, Missouri | Karl K. Hoagland | 12/11/74 |
| l C. Shepard | 9423 Meadowbrook Road<br>Philadelphia, Pennsylvania | None | 2/5/76 |
| es A. Smith | 181 Longhill Road<br>Great Notch, New Jersey | John Izard | 6/17/74;<br>12/11/75 |
| lliam Smith | 8926 Kilkenny Circle<br>Baltimore, Maryland | Henry King | 2/5/76 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Harold P. Steele, Jr. | 10189 Winsted<br>Cincinnati, Ohio | Edward Shaw<br>522 Fifth Avenue<br>New York, New York | 8/21/75;<br>12/11/75 |
| John Stevens | P. O. Box 215<br>Richton, Michigan | David List | 12/12/75 |
| Robert O. Stuberg | 2380 S.W. Timberline Drive<br>Portland, Oregon | Michael Anderson<br>(415-392-6320) | 1/16/75;<br>11/5/75 |
| George R. Sutch | 6749 82nd Avenue, S.E.<br>Mercer Island, Washington | Glenn McGee | 1/16/75 |
| James D. Terrell | 70 Manzanita Court<br>Millbrave, California | Malcolm Tuft | 6/19/74 |
| Earl G. Turvey | 3594 Village East<br>Franklin, Ohio | Bruce A. Hecker | 8/21/75 |
| John P. Watt | P. O. Box 265<br>Valley Forge, Pennsylvania | Glenn McGee | 11/4/75 |
| Robert M. Weaver | 1316 Rocking Horse Lane<br>La Habra, California | Frederic S. Newman | 2/26/75 |
| James E. Williams | 26572 Chisholm Court<br>Hayward, California | Sam Betar<br>(312-236-5517) | 2/5/76 |
| John L. Williams | 5235 Kenbrook, N.W.<br>Atlanta, Georgia | Harold Baker | 5/13/75 |

| NAME OF WITNESS | ADDRESS | COUNSEL | DATE(S) OF APPEARANCE |
|---|---|---|---|
| Charles Edward Lowe | 1319 Merit Place<br>Louisville, Kentucky | Leon Timmons<br>[Anaconda Aluminum,<br>Louisville, Kentucky] | 4/2/75 |
| James Lawrence Smith, II. | 3816 Indian View Avenue<br>Maremont, Ohio | William W. Ventress<br>[Procter & Gamble,<br>Cincinnati, Ohio] | 5/14/75 |
| William W. Ventress<br>Procter & Gamble | 9525 White Gate Lane<br>Indian Hill, Ohio | | 5/14/75 |
| James A. Hardgrove<br>Brown Company | Sidley & Austin<br>Chicago, Illinois | | 5/15/75 |
| Ruth A. Ricketts<br>Federal Folding<br>Box Company | 2416 Clinton Avenue<br>Berwyn, Illinois | Irving H. Goldberg<br>Goldberg, Weigle,<br>Mallin & Gitles<br>(312-332-5500) | 1/7/74 |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br><br>v.<br><br>ALTON BOX BOARD COMPANY, et al.,<br><br>Defendants. | ) | Criminal Action No. 76 CR 199 |
| IN RE FOLDING CARTON ANTITRUST LITIGATION<br><br>THIS DOCUMENT REFERS TO:<br><br>ALL ACTIONS | ) | Master File No. MDL 250 |

GOVERNMENT'S LOG OF GRAND JURY TRANSCRIPT QUOTED IN GOVERNMENT'S STATEMENTS SEEN BY DEFENSE COUNSEL

The following log requested by the Court during the April 22, 1977 hearing identifies the grand jury testimony quoted in Government's Statements filed with Chief Judge Parsons during the in camera hearings in aggravation and mitigation. Virtually all of the Statements contain summaries and paraphrasing from grand jury testimony of numerous witnesses. Only that testimony which was directly quoted has been listed in the log.

| DEFENDANTS | TRANSCRIPT CITED |
|---|---|
| Alton Box Board Company (read to attorneys for Alton by Chief Judge Parsons) | No specific transcript excerpts |
| Champion International | Robertson, 1/28/76, Tr. 172 |
| Gerald Adams<br>Mead Packaging | No direct grand jury transcript |
| John F. Allen<br>Hoerner Waldorf | No direct grand jury testimony |
| Robert E. Barnett<br>Alton Box Board Company | No direct grand jury testimony |
| George V. Bayly<br>Packaging Corporation of America | Turvey, 8/21/75, Tr. 35-37; Frey, 2/4/76, Tr. 80-81, 114-115; Robertson, 1/28/76, Tr. 159 |
| Fred L. Bohlke<br>International Paper Company | Shepard, 2/5/76, Tr. 94-95; Robertson, 1/28/76, Tr. 20 |
| William O. Brittain<br>Potlatch Corporation | Baker, 9/23/75, Tr. 93-94, 51; Lynn, 2/6/76, Tr. 75-76 |
| R. Harper Brown<br>Container Corporation of America | Blankenheim, 2/10/76, Tr. 76-79; Lambert, 8/19/75, Tr. 81-85 |
| Richard A. Buckman<br>Diamond International | Bell, 2/4/75, Tr. 44-45, 51 and 52 |



| DEFENDANTS | TRANSCRIPT CITED |
|---|---|
| H. L. Chorpening<br>Michigan Carton | No direct grand jury testimony |
| Ernest J. Curtis<br>International Paper Company | Steele, 12/11/75, Tr. 4-5, 7 and 13 |
| Carl DeFaria<br>Federal Paperboard | Coleman, 2/25/75, Tr. 45-49 |
| James C. Dickert<br>Hoerner Waldorf | Bell, 12/9/75, Tr. 103-104 |
| Clark W. Fisher<br>Federal Paperboard | Blankenheim, 2/10/76, Tr. 58-61 |
| James A. Gage<br>Diamond International | Bell, 2/4/76, Tr. 44-45, 48-49 |
| Wayne Gilsdorf<br>Diamond International | Steele, 12/11/75, Tr. 11-12, 25-27; Lynn, 2/6/76, Tr. 73-74 |
| Charles L. Hamilton<br>Packaging Corporation of America | Mumaw, 8/20/75, Tr. 119-120; Gort, 12/9/75, Tr. 28 |
| James A. Hannigan<br>Diamond International | Bell, 2/4/76, Tr. 44-45, 49-50 |
| William S. Hart<br>Fibreboard | Eldh, 11/6/75, Tr. 25-26, 27-28 |

| DEFENDANTS | TRANSCRIPT CITED |
|---|---|
| William J. Koslo<br>Diamond International | Blankenheim, 2/10/76, Tr. 20-21, 30, 37-39, 41-42, 100; Robertson, 1/28/76, Tr. 54 |
| Robert F. Krause<br>Packaging Corporation of America | Mumaw, 8/20/75, Tr. 119-120 |
| T. M. Little<br>Container Corporation of America | Watt, 11/4/75, Tr. 85-86; Hall, 5/15/75, Tr. 28-29 |
| James D. Maher<br>Boerner Waldorf | Doman, 6/26/75, Tr. 36, 38 |
| J. A. Neuman<br>Packaging Corporation of America | Gort, 12/9/75, Tr. 42-43 |
| Robert Ryan<br>Michigan Carton | Watt, 11/4/75, Tr. 34-35 |
| Jack D. Tovin<br>Container Corporation of America | Lambert, 6/25/75, Tr. 32-33; Empkie, 8/19/75, Tr. 42, 146-148; Meadows, 9/25/75, Tr. 71 |
| Paul J. Van Keuren<br>St. Regis | Bell, 2/4/76, Tr. 41 |
| W. C. Ward<br>International Paper | Robertson, 1/28/76, Tr. 48-49 |
| Donald H. Wedin<br>American Can Company | Stuberg, 11/5/75, Tr. 35; Eldh, 11/9/75, Tr. 29-30 |



| DEFENDANTS | TRANSCRIPT CITED |
|---|---|
| Robert D. Weyman<br>Diamond International | Lambert, 8/19/75, Tr. 69-75 |
| M. J. Wiersum<br>Boerner Waldorf | Bell, 12/10/75, Tr. 38; Gort, 12/9/75, Tr. 68 |
| Paul Wilch, Jr.<br>Diamond International | Turvey, 8/21/75, Tr. 21-22, 71-78 |
| George F. Wohlgemuth<br>International Paper | Robertson, 1/28/76, Tr. 72-73; Bell, 12/10/75, Tr. 102-103 |
| Paul H. Wolff<br>Alton Box Board Company | Blankenheim, 2/10/76, Tr. 48-51 |

Respectfully submitted,

Dated: May , 1977

D. BRUCE PEARSON

BARBARA A. MCANINCH

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Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1390

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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ALTON BOX BOARD COMPANY, ET AL.,
AND RICHARD ELDH, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

IN RE FOLDING CARTON ANTITRUST LITIGATION
(M.D.L. 250)

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

WADE H. MCCREE, JR.,
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# In the Supreme Court of the United States

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No. 77-1390

ALTON BOX BOARD COMPANY, ET AL., AND RICHARD ELDH, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

IN RE FOLDING CARTON ANTITRUST LITIGATION (M.D.L. 250)

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) and the order of the district court (Pet. App. B1-B5) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 1, 1977. A petition for rehearing and suggestion of rehearing *en banc* was denied on February 22, 1978. The petition for a writ of certiorari was filed on March 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether the district court abused its discretion in allowing a civil plaintiff to use the grand jury testimony of corporate employees to impeach, test the credibility of, or refresh the recollection of those employees as witnesses when the grand jury testimony to be disclosed had already been disclosed to one or more of the defendants.

## STATUTE AND RULES INVOLVED

The Jencks Act, 18 U.S.C. 3500(a), provides in part:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Rule 6(e) of the Federal Rules of Criminal Procedure provides in part:

> (1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.



> (2) *Exceptions.*-
>
> * * * * *
>
> (C) Disclosures othewise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding * * *

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides in part:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * * Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

## STATEMENT

In August 1974 the United States began a grand jury investigation in the Northern District of Illinois into allegations of price fixing by the manufacturers of

paperboard folding cartons. Most of the witnesses who testified before the grand jury were present or former employees of the prospective defendant companies. As is often the case in such investigations, corporate defense counsel debriefed witnesses following their grand jury testimony so that defense counsel could chart the course of the investigation and prepare future witnesses. Transcript of Proceedings Before Judge Will, June 24, 1977, pages 50-51, 63-64 (hereinafter "Transcript"). When an employee of one company testifying before the grand jury incriminated another company or its officers, defense counsel would provide that information to counsel for the company or individual implicated.[1]

The grand jury ultimately indicted twenty-three corporations and fifty individuals, officers of the defendant corporations, for their participation in a nation-wide conspiracy to fix the prices of folding cartons through bid-rigging, secret information exchanges, and by other means. Following indictment, defendant Weyerhaeuser Corp. inspected all of the testimony available to it under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure and exculpatory material under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Three individual defendants through counsel also inspected *Brady* material.

After initially entering pleas of not guilty, twenty-two of the corporate and forty-eight of the individual defendants changed their pleas to *nolo contendere*. Chief

[1]Thus, defendant Burt Co. said in an interrogatory answer that its counsel received "privileged communications with counsel for other defendants herein" in which they "were orally advised in a fragmentary manner by certain counsel for other defendants herein whether or not Burt was mentioned in certain testimony and, if so, the possible reference." Defendant F.N. Burt's Responses to Plaintiffs' First Consolidated Set of Interrogatories, October 15, 1976, Response to Interrogatory Number 4.



Judge Parsons entered pleas of guilty and undertook sentencing. The other three defendants went to trial.[2]

Sentencing of those pleading *nolo contendere* proceeded without pre-sentencing probation office reports as provided in Rule 32(c), Fed. R. Crim. P. The court relied on statements by each defendant and the government and presentations by each at *in camera*[3] hearings for each defendant. Transcript, pages 45-46. The government's statements summarized each defendant's involvement in the conspiracy. Transcript, pages 18-20. All of the defendants and their counsel heard the government's oral presentation of the contents of these statements at the sentencing hearings (Transcript, pages 45, 48), and thirty-five of the defendants, two corporations and thirty-three individuals, inspected the government's prepared statements of their participation. Government's Log of Grand Jury Transcript Quoted in Government's Statements Seen by Defense Counsel, pages 2-5. The material disclosed to the individual defendants in these statements frequently included grand jury testimony of subordinate employees of the corporate defendant which employed the individual defendant. *Ibid.;* Government's Log of Grand Jury Transcript Inspected by Defendants, pages 2-4 (identifying employers of grand jury witnesses).

The remainder of the disclosures of grand jury material which are at issue here occurred in the course of the trial of the three defendants who pleaded not guilty. Those

[2]The corporate defendant, Consolidated Packaging Corp., was convicted and its conviction was affirmed by the Seventh Circuit. *United States* v. *Consolidated Packing Corp.*, No. 77-1422, decided April 13, 1978. The two individual defendants were acquitted.

[3]Judge Parsons impounded the government's statements and held the sentencing hearings *in camera* to protect the rights of the defendants who had chosen to go to trial but whose trial had not yet been completed.

defendants, Consolidated Packaging Corp., one of its vice presidents, and an official of International Paper Co., made extensive examinations under the Jencks Act, 18 U.S.C. 3500(a), of grand jury testimony of the fourteen grand jury witnesses the government expected to call as trial witnesses, of exculpatory material under *Brady* v. *Maryland, supra*, and of other material submitted in lieu of a bill of particulars. Pet. 7; Government's Log of Grand Jury Transcript Inspected by Defendants, pp. 3-7. Here, too, some of the disclosures of the grand jury testimony were made to the senior officials of the companies which employed the grand jury witnesses.

Following commencement of the government's prosecution, private parties filed more than seventy-five treble damage suits, paralleling the government's criminal charges, against the corporate criminal defendants and at least three other corporations. These actions were consolidated under the rules regulating multi-district litigation. Plaintiffs, indicating that they intended to depose the grand jury witnesses or call them as trial witnesses, sought an order from the presiding judge, Judge Will, requiring the United States to produce grand jury testimony previously disclosed to any defendant in the criminal action and the pre-sentencing Statements in Aggravation made available to defendants. Memorandum in Support of Plaintiffs' Proposed Pretrial Order No. 14 Requiring Production of Grand Jury Materials, May 5, 1977, p. 6 filed in *In Re Folding Carton Antitrust Litigation,* Master File No. MDL 250. Judge Will referred the motion to Judge Parsons. Contemporaneously, the attorneys handling the government's criminal case moved Judge Parsons to lift his order impounding the pre-sentencing statements. Judge Parsons delegated his authority to act on both that motion and the motion for an order compelling disclosure of the grand jury transcripts to Judges Robson and Will, who were jointly presiding over the multi-district litigation.



After holding extensive hearings, the district court panel issued the order as to which review is sought. It allows counsel for plaintiffs to inspect and copy the grand jury material disclosed to any defendant, subject to strict limitations on the use of the material. The material is to be released only to the coordinating secretary for each side's executive committee, and each is to keep a log of counsel who make copies and what material is copied. The material is to be used only in the civil case, and "only for the purposes of impeachment of a witness, refreshing a witness' recollection as to matter to which he formerly testified, or testing a witness' credibility as to matters to which he formerly testified" (Pet. App. B4).

On appeal, the court of appeals said the test to be applied by the district court was whether the utility from disclosure to plaintiffs outweighed "any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances" (Pet. App. A4). And it held that, under the circumstances of this case, the district court did not abuse its discretion in holding that the benefits of disclosure outweighed the slight prospect of injury to the policy of secrecy.

## ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. Contrary to petitioner's contention (Pet. 12-14), the decision below does not conflict with *State of Texas* v. *United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), certiorari denied, No. 76-1710, October 11, 1977.

In *State of Texas*, a federal grand jury indicted nine companies for price fixing and other violations of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1 and 2. All the defendants pleaded *nolo contendere.* During the criminal proceeding the corporate defendants

obtained the grand jury testimony of their employees pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The State of Texas filed a civil antitrust action against the same companies based upon the same conduct and sought the production of the employee grand jury testimony previously disclosed to the corporate defendants. The district court granted a motion to compel production and certified the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). *State of Texas, supra*, 546 F. 2d at 628.

The court of appeals reversed. It stated that "[t]he issue presented is whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case" (546 F. 2d at 628). It held that particularized need must be shown, and that Texas had not shown that need because

> [t]he general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. [*Id.* at 631.]

In the present case the court of appeals did not find that prior disclosure "standing alone" dispensed with the requirement of need. Rather, as in *State of Illinois* v. *Sabaugh*, 552 F. 2d 768 (C.A. 7), certiorari denied *sub. nom. J.L. Simmons Co.* v. *Illinois*, No. 76-1661, October 11, 1977, it deemed a particularized showing satisfied by plaintiffs' need to prepare for the testimony of witnesses at depositions or in trial. Here, the prior grand jury testimony may be used solely for impeachment, refreshment or testing the witness' credibility. In these limited circumstances, the court concluded that plaintiffs had a particularized need which outweighed the limited remaining interest in grand jury secrecy.



In arguing that there is a conflict between the decision below and that of the Fifth Circuit in *State of Texas*, petitioners ignore the critical fact that the Seventh Circuit permitted disclosure only because of the additional factor, not invoked in *State of Texas*, that the witnesses whose grand jury testimony was sought would be called to testify at trial or deposition. In contrast, the Fifth Circuit held only that the fact that the corporate defendants had copies of their employees' testimony was not enough to show particularized need. Nothing in the Fifth Circuit's decision indicates that if the additional factor had been presented to the Fifth Circuit, that court would have denied production.[4]

2. The decision below does not involve any novel holding or any departure from prior law, and does not open the grand jury door wider than the existing particularized need standard permits, given Rule 16(a)(1)(A). Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Since the secrecy required by Rule 6(e) protects the identity of witnesses testifying before the grand jury, civil antitrust plaintiffs ordinarily will have to decide whether to call such persons for trial or deposition without knowing whether they had been grand jury witnesses. Only then may their grand jury testimony, as previously furnished to the corporate defendants, become available under the decision below. It is settled that the grand jury testimony of trial witnesses (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682) and deponents (*Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C.A. 2); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 42 (N.D.

---

[4]The Ninth Circuit's analysis of the *State of Texas* decision is to the same effect. See, *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127, 1130.

Ill.)) may be disclosed under the particularized need standard (cf. *Dennis* v. *United States*, 384 U.S. 855, 870, n. 15).

Petitioners appear to rely on the lack of formal disclosure pursuant to Rule 16(a)(1)(A) of employee grand jury testimony to the corporate employer (Pet. 13). The district court, however, properly declined to rely on such formalism. The existence of Rule 16(a)(1)(A) means that corporate employees who testify before a grand jury have every reason to believe that the party most able to retaliate for incriminating evidence, *State of Illinois* v. *Sarbaugh, supra*, 552 F. 2d at 775, will be able to inspect that testimony at some later date. In the present case, there had been considerable disclosure of prior grand jury testimony both to corporate employers and to superior employees. As a result, the district court properly exercised its discretion "in weighing the usefulness to plaintiffs of the material released against any type of impairment to the policy of secrecy which can reasonably be anticipated under the circumstances" (Pet. A-4). The lower courts applied the recognized legal standards and there is no occasion for this Court to consider the application of those principles to the particular facts here.

3. Petitioners' suggestion (Pet. 21) that permitting disclosure of grand jury testimony to others as a result of disclosure to the corporate defendant or its officers "abrogates" discovery rights under the Jencks Act, *Brady* v. *Maryland*, and Rules 16(a)(1)(A) and 32(c)(3)(A), is unpersuasive. Criminal defendants are often put to hard choices, but as this Court stated in *United States* v. *Nobles*, 422 U.S. 225, 241, the rights of the accused do not release it "from the legitimate demands of the adversarial system." The approach of the court of appeals provides adequate protection to the corporate defendants' interests. Use of grand jury testimony is



limited to situations where plaintiffs have shown compelling need and its use is limited to serving that need. There is nothing unfair in letting plaintiffs also obtain accurate relevant information already in the hands of their opponents. To the contrary, petitioners recognize "it is unfair to permit one side 'to have exclusive access to a storehouse of relevant fact' " (Pet. 15, quoting *Dennis* v. *United States*, 384 U.S. 855, 873).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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MAY 1978.

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Supreme Court, U. S.
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MAY 12 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1390

**ALTON BOX BOARD COMPANY, et al., and RICHARD ELDH,**
*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**
*Respondent.*

**In Re Folding Carton Antitrust Litigation**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

The chart of the Plaintiffs-Respondents found on pages 4 through 7 of their Brief in Opposition which purports to catalog the extent of the disclosure of grand jury testimony during the preceding criminal antitrust action is misleading. By listing the individual defendants in the criminal antitrust action beneath their corporate employer, the Respondents in their chart seek to convey the impression that there was extensive disclosure of grand jury testimony to the corporate criminal antitrust defendants, corporate Petitioners here, including disclosure of grand jury testimony to the witness' corporate employer.

Respondents, however, cannot so easily rewrite the record, and Petitioners' statements on pages 8 and 15 of their Petition for a Writ of Certiorari that no transcripts of any grand jury witness were or have been disclosed to the present corporate employer of that witness is completely correct. Each and every individual listed on the Respondents' chart was an individual defendant in the criminal antitrust action, and was represented by his own counsel, who was separate and distinct from the counsel representing the corporate defendants. With the exception of individual defendants Ernest J. Curtis, George F. Wohlgemuth, Fred L. Bohlke, Vern Kepford and Melvin E. Riecke, who examined portions of the grand jury transcripts of some witnesses, the disclosure of grand jury material to the remaining individual defendants occurred only during review by the individual defendant's counsel of the statement in aggravation pertaining to that particular defendant. Consequently, the disclosure that did occur was to the counsel for the individual defendants, and not to the corporate employer of the individual defendants or to the corporate employers of the grand jury witnesses.

To illustrate the misleading nature of Respondents' chart, on pages 4 and 5 the chart appears to indicate that American Can Company reviewed the grand jury transcripts of grand jury witness Stuberg and grand jury witness Petitioner Eldh. In fact, however, no officer of American Can Company has ever seen the grand jury testimony of Stuberg and Eldh, and it was only the counsel for individual defendant Donald H. Wedin who saw any excerpts of grand jury testimony as they appeared in the statement in aggravation relating to defendant Wedin.

Moreover, the record below discloses through the Affidavit of Henry P. Sailer, one of the counsel for American



Can Company in the civil action, that no information regarding the grand jury proceedings has been or will be disclosed to American Can Company or to him or other trial counsel for American Can Company. *See* Volume II of the Appendix as contained in the Certified Record at pages 516-517. To suggest, as the Respondents do in their chart, that disclosure of the testimony of a grand jury witness as contained in a statement in aggravation to the attorney for an individual defendant constitutes disclosure to that witness' corporate employer is unsupportable in law and in fact.

The Respondents' chart is further misleading in that it suggests that there was disclosure of grand jury material to Gulf States Paper Corporation, which was not one of the defendants in the criminal action, but is one of the defendants in the subsequent civil antitrust action. *See* the footnote on page 6 of the Petition for Writ of Certiorari. The only possible basis for this conclusion is that disclosure to Messrs. John L. Conlon and Mark Crane, counsel for individual defendant Vern Kepford in the criminal action, constitutes disclosure to Gulf States in the civil action, where Messrs. Conlon and Crane are acting as counsel for that company. Not only is there no basis in law for such an assumption, but the record below affirmatively discloses through the Affidavit of John L. Conlon that no disclosure relating to the grand jury proceedings has been or will be disclosed to Gulf States Paper Corporation. *See* Volume II of the Appendix contained in the Certified Record at pages 618-620. The record therefore refutes the Respondents' allegations found on page 13 of their Brief in Opposition that "grand jury testimony [is] freely available in the offices of counsel for the corporations and their managing employees. . . ."

Accordingly, what the Respondents attempt to portray as widespread disclosure of grand jury testimony to the corporate Petitioners here did not occur. No defendant corporate employer in the criminal or civil antitrust actions saw the grand jury testimony of any of its present corporate employees, and in fact, with the exception of Weyerhauser, Consolidated Packaging Corporation, and Champion International, no defendant corporation saw any grand jury testimony whatsoever. Nonetheless, the Courts below ordered disclosure of grand jury testimony even though the record demonstrates that a major policy reason to preserve grand jury secrecy still exists — to protect employees from retaliation by their employers and others in the industry and to thus assure that future grand jury witnesses will testify freely.

This Petition for Writ of Certiorari therefore presents a conflict between the Fifth and Seventh Circuits relating to the disclosure of grand jury testimony, and further presents important and recurring questions concerning the effective functioning of future grand juries which have not been presented in any petition for writ of certiorari previously filed with the Court, and which this Court should resolve.

Respectfully submitted,

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